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In the Supreme Court of the United States

OCTOBER TERM, 1986

JERRY W. TEDDER
SERGEANT, UNITED STATES ARMY,

PETITIONER

v.

THE UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BROOKS B. LA GRUA
Colonel, Judge Advocate General's Corps (JAGC)
United States Army
Defense Appellate Division
5611 Columbia Pike
Falls Church, VA 22041
(202) 756-1807
Counsel of Record

and

PAUL J. LUEDTKE
Lieutenant Colonel, JAGC
United States Army

ERIC T. FRANZEN
Major, JAGC
United States Army

SCOTT A. HANCOCK
Captain, JAGC
United States Army

QUESTION PRESENTED

Whether a prosecution premised solely on urinalysis results establishing the ingestion of an illegal drug, in the absence of evidence that such ingestion was wrongful and without instructions on permissive inferences or circumstantial evidence, unconstitutionally shifted the burden to the accused to prove that the ingestion of drugs was not wrongful.

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v.

THE UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner Jerry W. Tedder respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at ___ M.J. ___ (CMA 1987) (Appendix A). The opinion of the Army Court of Military Review is unpublished, SPCM 21681 (A.C.M.R. 1984) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 9, 1987, affirming petitioner's conviction dated April 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person shall . . . be deprived of life, liberty, or property without due process of law.

The Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 801 *et seq* (Supp II, 1984) provides:

> Article 112a:
> (a) Any person subject to this chapter who wrongfully uses . . . a substance described in subsection (b) shall be punished as a court-martial may direct.
> (b) The substances referred to in subsection (a) are the following:
> (1) . . . marijuana and any compound or derivative of any such substance.

The *Manual for Courts-Martial, United States, 1984* [hereinafter cited as *MCM*], Part IV, para. 37, provides:

> (b) Elements.
> (2) Wrongful use of controlled substance
> (a) That the accused used a controlled sustance; and
> (b) That the use by the accused was wrongful.

STATEMENT OF THE CASE

At the time immediately proceeding his court-martial, petitioner was a sergeant in the United States Army stationed at Fort Bragg, North Carolina and was a member of the 82nd Airborne Division. A sample of petitioner's urine was collected during an unannounced company-wide urinalysis inspection[1] conducted on 5 November 1984 (R. 57-71). The samples were delivered to Compuchem Laboratories on November 6, 1984 (Prosecution Exhibit 3, page 4). On

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[1] *See* Mil.R.Evid 313 (evidence gathered during an inspection may be admissible at courts-martial) and Dep't of the Army Regulation 600-35, Alcohol and Drug Abuse Prevention Control Program, para. 10-1(b) (3 November 1986) (outlining Army policy concerning urinalysis inspections and biochemical testing).

January 29, 1985, Compuchem Laboratories issued a report showing that the petitioner's urine sample was positive for tetrahydrocannabinol metabolites (the active ingredient in marijuana) (Prosecution Exhibit 3, Page 1). At petitioner's court-martial, the government offered prosecution Exhibit 3 and foundational testimony detailing how the report was compiled and then rested. The petitioner denied knowingly ingesting any substance containing tetrahydrocannabinol (R. 318). Petitioner presented exceptional character evidence including three officers, one first sergeant and one sergeant first class, who unanimously testified to his outstanding duty performance and excellent military character (R. 306, 308, 311, 314 and 316). In particular, Captain Beckerman, petitioner's company commander, testified that petitioner was the air movement noncommissioned officer and was jump master qualified on several airborne operations (R. 310).[2] The government presented no evidence in rebuttal.

The trial judge instructed the members of the court-martial as follows:

> The law presumes the accused to be innocent of the charge against him. (R. 339) . . . You must be convinced by legal and competent evidence beyond a reasonable doubt that, at Fort Bragg, North Carolina, between 5 October and 5 November 1984, the accused used marijuana. And that, two, the use by the accused was wrongful. (R. 341) . . . The burden never shifts to the accused to establish innocence or disprove the facts necessary to establish each element of the offense. (R. 341).

Defense counsel made no objection to these instructions (R. 346).

The members of the court-martial found petitioner guilty of one specification of the use of marijuana, in violation of

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[2] The positions of air movement officer and jumpmaster are extremely important and highly responsible positions in an airborne unit. Specifically, the jumpmaster is in command of the actual parachute jump, the rigging and safety checks of the troops and the decision when to exit the plane. By placing the petitioner in these positions the company commander implicitly indicated his trust and confidence in petitioner and his belief that petitioner was not a drug user.

Article 112a, UCMJ. He was sentenced to a bad-conduct discharge, confinement for six months, forfeiture of $200.00 pay per month for six months, and reduction to the rank of private E-1. The convening authority approved only so much of the sentence as provides for a bad conduct discharge, confinement for four months, forfeiture of $200.00 per month for four months and reduction to Private E-1. The Army Court of Military Review affirmed the findings and sentence, as did the United States Court of Military Appeals.

The issue litigated and considered by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was:

> WHETHER THE EVIDENCE IS SUFFICIENT AS A MATTER OF LAW TO PROVE BEYOND A REASONABLE DOUBT APPELLANT'S GUILT OF THE WRONGFUL USE OF MARIJUANA AS CHARGED.

REASONS FOR GRANTING THE WRIT

The issues presented by this case address fundamental precepts of due process and American jurisprudence in general. These issues deal with a subject matter that is currently of primary concern to the American public. The President of the United States has publicly decreed that drug abuse is a problem of national significance.[3] The Attorney General has indicated that he believes that "drug testing" can be an effective means to eradicate the drug problem.[4]

In light of the current, and well justified, "anti-drug" climate in the United States, it is incumbent upon the Court to exercise its traditional supervisory role over the lower

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[3] Los Angeles Times, Feb. 14, 1987, at Part 1, page 12; Column 1; and New York Times, Feb. 4, 1987, Section D, page 24, Column 1.

[4] United Press International, March 27, 1987, Regional News, ("U.S. Attorney General Edwin Meese on Friday said drugs are still the Nation's top social problem but drug testing could help insure drug-free workplaces.") and United Press International Feb. 24, 1987, Regional News (U.S. Attorney General Meese stated that drug testing would help ensure that air traffic controllers, airline pilots and railroad engineers are not working while under the influence of dangerous drugs). *See also* Congressional Quarterly, April 4, 1987, Vol. 414, No. 14; page 626 (explaining new policy for drug-testing of federal employees).

courts and provide a framework for the constitutional use of the chemical analysis of body fluids. Although this case involves a military criminal proceeding, a decision by the Court would prove instructional to civilian courts, both civil and criminal.[5]

Lower civilian courts have recognized that urinalysis results may be used as the only evidence in a parole revocation hearing, *Smith v. State*, 250 Ga. 438, 298 S.E.2d 482 (1983) and in a prison disciplinary hearing. *Jensen v. Lick*, 589 F.Supp. 35 (D.C.N.D. 1985) and *Wykoff v. Resig*, 613 F.Supp. 1504 (N.D. Ind. 1985). It is foreseeable that urinalysis results may be used in future civilian prosecutions.

Petitioner submits that the trial judge's lack of instructions and the facts of this case, including the "mystique" of urinalysis, implied to the court-martial members[6] that they could decide this case without any government evidence on the wrongfulness element of the charged offense. Thus the members inferred that they were to rely on a mandatory presumption of wrongfulness which unconstitutionally shifted the burden of proof to the petitioner and required him to prove his innocence.

Assuming *arguendo* that a presumption was not implied, the permissive inference relied upon by the govermment to satisfy the wrongfulness element of the charge was not rationally connected by common experience and logic to those facts proven by the government. Because the government's reliance on this inference was unjustified, it failed to prove a *prima facie* case and the military judge should have withheld the case from the members.

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[5] A recent article implies that the military's drug testing program may serve as precedent for expanding drug testing to other federal agencies. *See* Newsweek, August 11, 1986, "Trying to Say 'No.' ".

[6] Court-martial members act much the same as a civilian jury and are responsible for following the judge's instructions and applying them to the facts of the case. Article 25, UCMJ. In petitioner's case, the court-martial was required to be composed of at least three members, the concurrence of two-thirds of whom were required to render a verdict of guilty. Articles 16 and 52, UCMJ. In actuality petitioner's case was decided by seven members, five of whom must have concurred in finding him guilty.

Assuming *arguendo* that the government relied on a justifiable permissive inference, the petitioner's denial of knowing or wrongful use of marijuana and testimony supporting a theory of unknowing use rebutted the government's inference of wrongfulness and thus required the government to prove the element of wrongfulness beyond a reasonable doubt. The government failed to provide any evidence on wrongfulness and therefore failed to present a *prima facie* case.

The Court of Military Appeals affirmed petitioner's conviction based in part on its decision in *United States v. Ford,* 23 M.J. 331 (CMA 1987). Petitioner submits that in *Ford,* the court failed to recognize the fundamental constitutional issues present in this case or properly apply this Court's precedent and thereby based its decision on over simplified legal reasoning. Action by this Court is necessary to correct the lower court's misapplication of law and to provide guidance to other courts regarding the permissible use of the chemical analysis of body fluids in relation to inferences, presumptions, and proof beyond a reasonable doubt.

I

THE MILITARY JUDGE'S LACK OF INSTRUCTIONS ON PREMISSIBLE INFERENCES AND CIRCUMSTANTIAL EVIDENCE REASONABLY IMPLIED AN UNLAWFUL MANDATORY PRESUMPTION OF WRONGFULNESS AND THEREBY RELIEVED THE FACT FINDERS OF THEIR DUTY TO FIND GUILT BEYOND A REASONABLE DOUBT ON ALL ELEMENTS OF THE CRIME AND SHIFTED THE BURDEN OF PROOF TO THE PETITIONER.

In *Francis v. Franklin,* 471 U.S. 307 (1985) a judge's instructions which included the statement, "A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted", was found to have created a mandatory presumption and thereby unconstitutionally relieved the state of it burden of proof on every element of the offense. *Citing Sandstrom v. Montana,* 442 U.S. 150 (1979)

(Reasonable juror could have interpreted an instruction which stated that the law presumes a person intends the ordinary consequences of his voluntary acts to mean that it was presumed that the accused intended his acts).[7] In both cases the Court analyzed the context in which the instructions were given and the circumstances of the cases themselves and then related these factors to what a reasonable jury might have concluded. In particular, the Court noted that in *Francis v. Franklin,* 471 U.S. at 323 and 324, the judge's instructions were contradictory to each another. The instruction that a person "is presumed to intend the natural and probable consequences of his acts" is in conflict with the later instruction that "criminal intention may not be presumed." *Id.* The Court explained that in light of such a quandary a reasonable juror could have believed that the instructions required him to presume the element of intent and that the burden of persuasion fell on the accused to show his lack of intent. *Id.* at 325.

In petitioner's case the crime charged involved only two elements. The government was required to prove that petitioner used a controlled substance and that his use was wrongful. Part IV, para. 37(b), *MCM.* The government presented no proof other than foundational testimony necessary to admit a laboratory report. The government's proof tended to show that at some point prior to the urine seizure the appellant had ingested, by undeterminable means, some amount of marijuana. Government counsel apparently hoped to show, circumstantially, that because tetrahydrocannabinol metabolites were found in petitioner's urine the finders of fact could properly infer that petitioner wrongfully or knowingly used marijuana. The military judge's instructions made no reference to the use of a permissive inference by the finder of fact in order to satisfy the wrongfulness element.

By sending this case to the finders of fact without instructing them on the use of a permissive inference, the military

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[7] *See also* In re Winship, 358 U.S. 358, 364 (1970) (government is required by the due process clause to prove each element of an offense beyond a reasonable doubt).

judge and the circumstances of this case implied to the fact finders that they must presume the missing element of wrongfulness. The fact that the military judge submitted the case to the court conclusively implied that a *prima facie* case existed as to every element of the offense and that the members could decide the case.[8] Because a *prima facie* case as to wrongfulness was not proven and no instructions regarding a permissive inference were given, the fact-finders were, in essence, led to believe that they must presume the element of wrongfulness in order to decide the case. Thus once the fact-finders found that petitioner had ingested marijuana they had no recourse but to also find that the ingestion was wrongful.

A presumption which amounts to an impermissible shifting of the burden of persuasion to the accused can not stand. *Leary v. United States,* 395 U.S. 6 (1969) (statute that provides that possession of marijuana is sufficient to sustain a conviction for the knowing possession of illegally imported marijuana unless the accused proves otherwise was unconstitutional); *Tot v. United States,* 319 U.S. 463 (1943) (statute that provides that possession of a weapon or ammunition by an accused convicted of a violent crime presumes that the weapon or ammunition was shipped or transported by interstate or foreign commerce unless the accused proves otherwise was unconstitutional). Where the government has only to establish the admissibility of a laboratory report as its case, an accused who presents no evidence to rebut the presumption that the metabolites arrived in his body knowingly and or wrongfully is certain to be convicted. This is particularly true considering the "mystique" of urinalysis. The government's case involved a superficially impressive laboratory report and foundational testimony from a chemist with a doctorate degree. Such evidence created the appearance to reasonable fact-finders that the government had

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[8] Had the military judge given the proper instructions concerning the use of a permissive inference, the existance of a presumption would not be an issue before the Court. Petitioner submits that it is important for the Court to convey to lower courts that such intructions must be given to avoid creating a presumption of guilt against an accused.

proven all elements of the offense. In actuality the laboratory report and expert provided no evidence regarding petitioner's wrongful or knowing ingestion use of marijuana.

Petitioner's case is distinguishable from *Barnes v. United States,* 412 U.S. 837 (1973) (common law inference of knowledge that property had been stolen, arising from possession of stolen goods in constitutionally justified). In *Barnes* the evidence established that the accused possessed recently stolen treasury checks payable to unknown individuals. *Id. Barnes* involved a permissive inference and not a presumption. The judge instructed the jury that under certain circumstances an accused's unexplained possession of stolen goods, the jury may serve as a basis to infer knowledge that the goods were stolen. *Id.* at 841. The facts and circumstances were held to justify the inference. *Id.* at 846. In petitioner's case the military judge provided no instructions regarding inferences or presumptions concerning the unproven element of wrongfulness. Although the facts and circumstances of petitioner's case may have justified a permissive inference of wrongfulness, they implied to reasonable fact finder a mandatory presumption of wrongfulness.

II

ASSUMING *ARGUENDO* THAT A PRESUMPTION WAS NOT IMPLIED TO THE MEMBERS, THE PERMISSIVE INFERENCE RELIED ON BY THE GOVERNMENT AND ULTIMATELY THE MEMBERS TO SATISFY THE ELEMENT OF WRONGFUL USE WAS NOT RATIONALLY CONNECTED BY COMMON EXPERIENCE AND LOGIC TO THOSE FACTS PROVEN BY THE GOVERNMENT.

In *Francis v. Franklin,* 471 U.S. 307, the Court explained the use of a permissive inference. A permissive inference does not relieve the government of the burden of proof, but merely allows the jurors to decide if a suggested conclusion may be inferred from those facts proven. *Id.* at 315. In order for the inference to stand, the facts must logically imply the unproven fact by common experience and reason. *Id.* at 315,

citing Ulster County v. Allen, 442 U.S. 140 (1979) (Instructions that directed jury to consider all circumstances tending to support or contradict inference proposed by state that all four occupants of a vehicle possessed an illegal weapon was permissive rather than mandatory and therefore constitutional).

In petitioner's case the military judge gave no instructions similar to those in *Ulster County.* The fact that petitioner ingested some amount of marijuana thereby causing tetrahydrocannabinal metabolites to be present in his urine, does not logically suggest by common fact and reason that petitioner wrongfully or knowingly used marijuana. The government's expert, Dr. Fyfe, admitted on cross examination that an individual could consume marijuana, not feel its effects, and produce positive results on a urinalysis test (R. 286). Although not presented at trial, other experts are in agreement.

> Marijuana is commonly smoked in social situations in which not all present smoke the drug. It is therefore possible that the nonsmoker could passively inhale enough of the cannabinoids in marijuana smoke . . . to excrete detectable amounts of metabolic products in their urine.

M. Perez-Reyes, *Passive Inhalation of Marijuana Smoke and Urinary Excretion of Cannabinoids,* 34 Clin. Pharmacol. Ther. 1 (1984). *See also Eighth Air Force Urinalysis Guide,* 21 Jan. 1985, pp.17, 18 reprinted in its entirety in *Army Trial Defense Service Memorandum* 85-2, Attachment 8-23 (1 October 1985) (Unknown ingestion has also been found to be a possible means of producing a positive urinalysis result. Marijuana may be baked in brownies, stew or chili. "Normally one is not going to recognize marijuana when ingested if placed in food").

Petitioner's case is similar to those cases where the Court held that the facts proved did not logically support, by common experience and reason, the inference sought to be established. *See Turner v. United States,* 396 U.S. 398 (1970) (statute stating that unexplained possession of cocaine allows inference that accused trafficked in illegally imported nar-

cotics was not justified because cocaine is both imported and produced in United States for legal purposes; and for similar reasons a statute stating that the absence of tax stamps is *prima facie* evidence of violation of another statute prohibiting the trafficking of illegally imported cocaine was not constitutional).[9] In petitioner's case, the government provided no explanation to the fact-finders why it was more likely than not that petitioner's positive urinalysis results were caused by his wrongful use of marijuana rather than by some other cause.[10]

The government's expert stated that, "[t]he THC acid – delta-9-THC acid can only get in the urine – unless its put directly into the urine by somebody – by ingesting it, by smoking it, or by injecting it into the veins" (R. 230). The expert opined that the petitioner's sample was "positive for delta-9-THC acid" (R. 262), but provided no opinion or information concerning whether the metabolites were in petitioner's urine because of wrongfulness on his part. The expert, however, did agree that an individual could unknowingly consume marijuana, not feel its effects, and produce positive urinalysis results (R. 286). Petitioner submits that an opinion by the prosecution expert on whether the amount of metabolites in an accused's urine precluded the possibility of passive inhalation or ingestion is a reliable and constitu-

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[9] *See also* Leary v. United States, 395 U.S. 6 (1969) (statute that provided that possession of marijuana was sufficient to sustain conviction for knowing possession of illegally imported marijuana was not a logically supported permissive inference); United States v. Romano, 382 U.S. 136 (1965) (statute that provided that accused's presence at an illegal still created an inference that he owned the still was unconstitutional because there was no connection between the two premises based on common experience); and Tot v. United States, 319 U.S. 463 (1943) (statute that provided that possession of a weapon or ammunition by an accused convicted of a violent crime, allowed inference that the weapon or ammunition was transported by interstate or foreign commerce was irrational and illogical because the connection between facts proved and those sought to be inferred was not grounded in common experience).

[10] *Cf.* United States v. Murphy, 23 M.J. 310 (CMA 1987) ("[W]here scientific evidence is relied upon to prove the use of marijuana, the Government may not presume that the judge or members are experts capable of interpreting such evidence").

tionally acceptable means for proving the offense of the unlawful use of marijuana when detected by urinalysis. *See e.g. United States v. Harper*, 22 M.J. 157 (CMA 1986) (court held that accused's conviction was not based solely on laboratory reports because expert opined that the amount of metabolite in urine as indicated by the report precluded passive use).

The result of the government's case and the trial judge's instructions, or lack thereof, forced the petitioner to rebut an illogical and unsubstantiated inference of wrongfulness. Petitioner's circumstances were not unlike those of the accused in *Mullaney v. Wilbur*, 421 U.S. 684 (1976). In *Mullaney* the judge instructed the jury in a homicide case that malice aforethought was conclusively implied unless the accused proved by a preponderance of evidence that he acted in the heat of passion. The Court held that the govenment had the burden of proving the accused's intent and when the issue of heat of passion or sudden provocation was properly raised, the government had the burden to disprove this issue and affirmatively prove malice aforethought. *Id.* In petitioner's case, the government should have had the burden of affirmatively proving petitioner's wrongful use by disproving innocent or nonintentional use. *See United States v. Harper*, 22 M.J. at 160. Because the government failed to present evidence on the element of wrongfulness, the military judge erred in not withdrawing the case from the fact-finders.

III

PETITIONER'S DENIAL OF KNOWING USE OF MARIJUANA AND EVIDENCE THAT HE COULD HAVE UNKNOWINGLY CONSUMED MARIJUANA REBUTTED THE GOVERNMENT'S PERMISSIVE INFERENCE OF WRONGFULNESS AND THUS REQUIRED THE GOVERNMENT TO PRESENT EVIDENCE ON AND PROVE THE ELEMENT OF WRONGFULNESS.[11]

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[11] A similar issue has been raised before the Court in United States v. Douglas, ___ M.J. ___ (CMA 1987) cert. pet. filed May 29, 1987.

Even if the government's inference of wrongfulness was logical and properly substantiated, its permissive use was nullified by petitioner's evidence to the contrary. In *Mullaney v. Wilbur,* 421 U.S. 684 (1975), the Court held that an evidentary inference may be employed to satisfy an element unless it is contradicted by other properly presented evidence. Once contradicted the element must be proven by competent evidence. *Id.* In an apparent attempt to incorporate *Mullaney,* the *Manual for Courts-Martial* provides:

> Possession, use, distribution, introduction, or manufacture of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented then the burden of proof is upon the United States to establish that the use, possession, distribution, manufacture, or introduction was wrongful.

Part IV, para. 37(c)(5), *MCM.* Petitioner submits that he presented some evidence which contradicted the government's inference of wrongfulness and thus required the government to go forward and present evidence to establish the element of wrongfulness.

As discussed *infra,* petitioner established that an individual may unknowingly consume marijuana, not feel its affects and still produce positive urinalysis results (R. 286). Petitioner also denied under oath ever knowingly using marijuana (R. 318). These facts clearly constitute evidence which contradicts the government's inference. However, the court below in *United States v. Ford,* 23 M.J. 331 (CMA 1987) unjustifiably expanded the standard regarding inferences set out in *Mullaney v. Wilbur,* 421 U.S. 684 and Part IV, para. 37(c)(5), *MCM,* by leaving it up to the fact-finders to believe or disbelieve that accused's evidence contradicting the government's inference. *Ford,* 23 M.J. at 336. The lower court explained that the government needed to persuade the fact-finders that the accused's evidence contradicting the inference should be disbelieved. *Id.* at 336.

The lower courts' reasoning is wrong. The holding implicitly shifts the burden of persuasion to the accused to disprove the government's inference. It is clear from *Mullaney v. Wilbur*, 421 U.S. at 702-703 and Part IV, para. 37(c)(5), *MCM*, that only a burden of production shifts to the accused once a permissive inference is established and that a burden of persuasion never shifts to the accused. If the accused can meet his burden of production then the inference becomes unsustainable and the government must produce evidence on this unproven element. Petitioner produced uncontroverted evidence challenging the government's inference; consequently, the military judge should have withheld the case from the fact finders unless the government produced evidence on the missing element of wrongfulness.

CONCLUSION

The lower court's decision in this case represents a misinterpretation and misapplication of constitutional law. The lower court has taken a simplistic view towards complex and fundamental legal issues. Besides affirming the conviction and punishment of a soldier whose guilt was not proven beyond a reasonable doubt, the decision provides erroneous precedent for other courts to follow. Petitioner asks the Court to issue a writ of certiorari to the United States Court of Military Appeals in order to reverse the lower court's deci-

sion and issue an opinion from the Court providing guidance to other courts on the constitutional uses of the chemical analysis of body fluids.

Respectfully submitted,

BROOKS B. LA GRUA
Colonel, Judge Advocate General's Corps (JAGC)
United States Army
Defense Appellate Division
5611 Columbia Pike
Falls Church, VA 22041
(202) 756-1807
Counsel of Record

and

PAUL J. LUEDTKE
Lieutenant Colonel, JAGC
United States Army

ERIC T. FRANZEN
Major, JAGC
United States Army

SCOTT A. HANCOCK
Captain, JAGC
United States Army

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 55306/AR
CMR Dkt. No. 21681

UNITED STATES, APPELLEE

v.

JERRY W. TEDDER (417-78-9639), APPELLANT.

ORDER

On consideration of the granted issue (23 M.J. 288) in light of *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987), and *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987), it is, by the Court, this 9th day of April, 1987,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

APPENDIX B

UNITED STATES ARMY
COURT OF MILITARY REVIEW

SPCM 21681
82d Airborne Division

UNITED STATES, APPELLEE

v.

SERGEANT JERRY W. TEDDER 417-78-9639,
UNITED STATES ARMY, APPELLANT.

E. M. Urech, Military Judge

Before Yawn, Williams, and Kennett Appellate Military Judges

For Appellant: Lieutenant Colonel William P. Heaston, JAGC, Major Edwin D. Selby, JAGC, Captain Scott A. Hancock, JAGC (on brief).

For Appellee: Lieutenant Colonel Gary F. Roberson, JAGC, Major Byron J. Braun, JAGC, Captain John F. Burnette, JAGC (on brief).

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31 March 1986

MEMORANDUM OPINION

Per Curiam:

Contrary to his pleas, appellant was found guilty of one specification of use of marijuana in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a (Supp. I 1983), by a panel of officer and enlisted members sitting as a

special court-martial. He was sentenced to forfeit $200.00 pay per month for six months, to be reduced to E-1, to be confined for six months, and to be discharged from the service with a bad-conduct discharge. The convening authority approved only so much of the sentence as provides for a bad-conduct discharge, forfeiture of $200.00 pay per month for four months, confinement for four months, and reduction to E-1.

Appellant's conviction was based primarily on laboratory analysis of a specimen of his urine which revealed the presence of tetrahydrocannabinol metabolites. On appeal, he argues the chain of custody document which supported the laboratory report was not complete. Specifically, he argues the document does not account for the location of his specimen from 6 November 1984 to 4 December 1984. The specimen was released to "Temporary Storage Receiving Area" by a Receiving Department employee on 6 November 1984 (Prosecution Exhibit 3). The receiving area consisted of open shelves inside the building in the Receiving Department. On 4 December 1984, another Receiving Department employee received the specimen from "Temporary Storage Refrig #2" (Prosecution Exhibit 3). This was a refrigerated truck located outside the building. Although the record contains no explanation of how, when, or by whom, the specimen was moved from the "Receiving Area" to "Refrig #2," both locations were under the Receiving Department's control. Also, appellant's specimen container was labeled with his name, social security number, and a laboratory identification number (Prosecution Exhibit 5). These were in place from the time the laboratory received the specimen until it was placed in "Long Term Storage" on 4 December 1984, and there was no evidence of tampering with the specimen. Accordingly, we find no merit in appellant's argument. *See United States v. Hudson*, 20 M.J. 607 (AFCMR 1985), *pet. denied*, 21 M.J. 32 (CMA 1985).

Appellant also argues evidence consisting solely of laboratory results of urinalysis is insufficient as a matter of law to prove beyond a reasonable doubt appellant's guilt of the wrongful use of marijuana as charged. We disagree. Use

of marijuana by a soldier may be inferred to be wrongful in the absence of evidence to the contrary. Paragraph 37(c)(5), Part IV, Manual for Courts-Martial, United States, 1984.

We have also considered the issue personally raised by appellant and find they have no merit.

The findings of guilty and the sentence are affirmed.

FOR THE COURT,

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

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No. 86-1934

In the Supreme Court of the United States

OCTOBER TERM, 1987

JERRY W. TEDDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

NORMAN G. COOPER
Col., JAGC, USA

GARY F. ROBERSON
Lt. Col., JAGC, USA

PATRICK A. HEWITT
Capt., JAGC, USA

PATRICK D. O'HARE
Capt., JAGC, USA

VITO A. CLEMENTI
Capt., JAGC, USA

Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
Falls Church, Va. 22041-5013

QUESTION PRESENTED

Whether the absence of an instruction permitting the court-martial panel to infer that petitioner's use of marijuana was wrongful shifted the burden of proof on that element of the offense from the government to petitioner.

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OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a) is reported at 24 M.J. 129. The opinion of the Army Court of Military Review (Pet. App. 2a-4a) is unpublished.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 8, 1987. The petition for a writ of certiorari was filed on June 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a special court-martial at Fort Bragg, North Carolina. Petitioner was convicted of the wrongful use of marijuana, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. (Supp. III) 912a. He was sentenced to six months' confinement, partial forfeiture of his pay, a reduction in rank, and a bad conduct discharge. Pursuant to Article 60, UCMJ, 10 U.S.C. (& Supp. III) 860, the convening authority reviewed the case and approved only so much of the sentence as provided for confinement for four months, partial forfeiture of pay, a reduction in rank, and a bad conduct discharge. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 2a-4a). The Court of Military Appeals summarily affirmed (Pet. App. 1a).

1. At the time of the offense, petitioner was a non-commissioned officer in the 82d Airborne Division at Fort Bragg, North Carolina. On November 5, 1984, petitioner submitted a urine sample during a urinalysis test (Tr. 50-51, 57-71, 87-90). All of the urine samples from petitioner's unit were delivered to CompuChem Laboratories the following day (GX 3, at 4). CompuChem's testing of petitioner's urine sample revealed the presence of tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana (GX 3, at 1).[1]

At trial, the government presented evidence regarding the procedures and methods used to secure

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[1] THC can be found in the urine only if "it's put directly into the urine by somebody—by ingesting it, by smoking it, or by injecting it into the veins" (Tr. 230).

petitioner's urine sample for testing (Tr. 57-83, 85-92). Three witnesses explained the procedures used in the receipt, testing, and safeguarding of petitioner's urine sample (Tr. 100-166, 167-172, 218-300). The evidence showed that petitioner's urine tested positive for the presence of THC in a concentration almost two-and-a-half times the concentration necessary to produce a "positive" test result (Tr. 230, 260-261). Petitioner testified in his own defense. He denied using marijuana, and he stated that he "ha[d] no idea" why his sample was positive (Tr. 318-319). Petitioner also presented testimony from three officers and two non-commissioned officers as to his good military character (Tr. 305-316).

As part of his preliminary instructions, the trial judge advised the court-martial panel that "[u]nder the law the accused is presumed to be innocent of the offense. The government has the burden of proving the accused's guilt beyond a reasonable doubt" (Tr. 13). At the close of the evidence, the trial judge gave the following instructions (Tr. 340-341, 342):

> You may find the accused guilty of an offense only if you're convinced as to guilt by legal and competent evidence, beyond a reasonable doubt, as to each and every element of that offense. * * * You must be convinced by legal and competent evidence beyond a reasonable doubt that, at Fort Bragg, North Carolina, between 5 October and 5 November 1984, the accused used marijuana. And that, two, the use by the accused was wrongful. * * *
>
> You're further advised that, first, the accused is presumed to be innocent until his guilt is established by legal and competent evidence beyond

> a reasonable doubt. Second, if there's a reasonable doubt as to the guilt of the [accused], then the doubt must be resolved in favor of the accused and he must be acquitted. And lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the Government. The burden never shifts to the accused to establish innocence or disprove the facts necessary to establish each element of the offense.
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> * * * * *
>
> The rule as to reasonable doubt extends to every element of the offense * * *. [I]n weighing and evaluating the evidence you're expected to utilize your own common sense, your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence. * * * You may properly believe one witness and disbelieve several other witnesses whose testimony is in conflict with the one.

Petitioner did not object to these instructions, nor did he request additional instructions.

On appeal, the Army Court of Military Review affirmed petitioner's conviction (Pet. App. 2a-4a).[2] The Court of Military Appeals also affirmed petitioner's conviction (Pet. App. 1a).

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[2] Article 66(c), UCMJ, 10 U.S.C. 866(c), authorizes a court of military review to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." The Court of Military Review independently reviewed the sufficiency of the evidence against petitioner and concluded that he was guilty.

ARGUMENT

1. Petitioner contends (Pet. 6-9) that the trial judge's failure to instruct the court-martial panel that it could infer that his use of marijuana was wrongful violated the Due Process Clause. Petitioner did not assert that complaint at trial, however, and has therefore waived his claim in the absence of plain error. Rule for Courts-Martial 920(f), *Manual for Courts-Martial, United States—1984* [hereinafter *Manual*]; *United States* v. *Fisher*, 21 M.J. 327 (C.M.A. 1986) (standard of review for instructional error raised for the first time on appeal is plain error). In any event, petitioner's claim lacks merit.

Petitioner argues that the " 'mystique' of urinalysis" (Pet. 8)[3] combined with the trial court's failure to give an appropriate instruction on a permissive inference of wrongfulness would have led the jury to conclude that the government had to prove only that he used marijuana, and not that his use was also wrongful. That contention is novel, but without substance, since it ignores the correct instructions given by the trial judge. The trial judge made clear that the government bore the burden of proving each element of the charged offense beyond a reasonable doubt, and that wrongfulness was one such element (Tr. 340-343). The trial judge therefore did not take

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[3] Insofar as petitioner suggests that the court members were unduly impressed by a scientific process, we would note that all of the court-martial panel members acknowledged during voir dire that urinalysis test results are not evidence of such great weight that further consideration of guilt or innocence is foreclosed (Tr. 27-29). Moreover, all panel members indicated a belief in the fallibility of the laboratory that performed the urinalysis on which the charges against petitioner were based (Tr. 29-31).

this issue away from the court-martial panel. In addition, the panel was instructed that it could "properly believe one witness and disbelieve several other witnesses whose testimony is in conflict with the one" (Tr. 342). Implicit in that guidance is the notion that the jury was free to believe or disbelieve petitioner's contention that he had "no idea" of how THC was found in his urine (Tr. 319). In fact, the only mandatory presumption referred to by the trial judge was that petitioner was presumed to be innocent of the crime (Tr. 339, 341). Accordingly, no reasonable panel member could have concluded that the government was not required to prove that petitioner's use of marijuana was wrongful. See *Sandstrom* v. *Montana*, 442 U.S. 510, 514 (1979).

2. Petitioner maintains (Pet. 9-12) that it is irrational to infer that his use of marijuana was wrongful in the absence of direct proof on this issue. Petitioner also argues (Pet. 12-14) that the permissive inference authorized by *Manual* Pt. IV para. 37c(5) does not apply where, as here, the defendant has rebutted the inference by offering evidence that his use of marijuana was innocent.[4] Those conten-

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[4] Petitioner presented very little evidence challenging the wrongfulness of his use of marijuana. He presented a "good soldier" defense (Tr. 305-316); defense counsel's cross-examination essentially consisted of an attack on the laboratory procedures (Tr. 53-54, 75-77, 92, 125-135, 138-147, 164-165, 205-214, 262-286, 292-297); and defense counsel's closing argument focused exclusively on the possibility that the laboratory had made a mistake and on petitioner's good military character (Tr. 327-334). Defense counsel asked only three questions vaguely suggesting that petitioner had innocently ingested marijuana (Tr. 286). In short, petitioner's defense focused on the "use" element of the offense, not on

tions are not materially different from the claims presented in the petition in *Douglas* v. *United States*, No. 86-1893. For the reasons given in our brief in opposition in that case,[5] further review of petitioner's claims is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

NORMAN G. COOPER
Col., JAGC, USA

GARY F. ROBERSON
Lt. Col., JAGC, USA

PATRICK A. HEWITT
Capt., JAGC, USA

PATRICK D. O'HARE
Capt., JAGC, USA

VITO A. CLEMENTI
Capt., JAGC, USA

Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency

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the "wrongfulness" element. In light of the paucity of evidence rebutting the showing of wrongfulness, petitioner's theory appears to be that a permissive inference of wrongfulness would be improper if the accused uttered a bare denial of wrongdoing.

[5] We have provided petitioner's counsel with a copy of our brief in *Douglas*.

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